SARAWAK SECURITIES SDN BHD

v.

ANDY CHAN CHIAW GUAN;
FABIAN EH NG (THIRD PARTY)

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[SUIT NO: KG 98 OF 1994/II]
28 JUNE 2000

SECURITIES: *Overtrading - Losses - Liability - Whether client or remisier - Whether remisier condoned act of client to trade beyond trading limit*

The plaintiff was a securities company and the defendant was its client. The defendant dealt with the third party ('T/P') who was a remisier with the plaintiff, in all transactions in his trading account. The defendant traded beyond his trading limit and incurred contra losses. The plaintiff now claimed against the defendant for a sum of RM509,430.83 for the said contra losses. The defendant claimed an indemnity in the said sum against the T/P whilst the T/P claimed that he did not attempt to stop the defendant trading beyond his trading limit because of an alleged promise of RM1 million by the defendant.

Held:

[1] The application to open a trading account was a valid and binding document whose terms and documents were binding on the defendant. Basically, parties are bound by the terms and conditions of the contract entered into under a trading account for the purchase and sale of shares. The relationship between the parties herein was purely contractual.

[2] The documents to show that there were other remisiers trading in the defendant's account were inadmissible for non-discovery. This was only alleged for the first time in the cross-examination of the T/P. Where there is an order for discovery, a party is obliged to make discovery of all documents relevant to the matters in his action. Moreover, this allegation was not pleaded by the defendant in either the T/P's statement of claim or in his statement of defence.

[3] The evidence showed that the defendant had incurred the contra losses in his account. The plaintiff had proved to the satisfaction of the court its claim against the defendant.

[4] The T/P had tacitly allowed or condoned the act of the defendant by placing large orders beyond his trading limit. There was no evidence of an alleged promise of RM1 million by the defendant. There was also no evidence that the defendant had RM1 million in cash or other assets.

[5] The T/P had deposited into the remisiers's account, a provision for the contra losses incurred in the defendant's account. In other words, the T/P as agent of the plaintiff had accepted the responsibility by making good the losses with a provision in the remisier's account.

[6] In allowing the defendant to overstep his trading limit, the T/P had committed a breach of duty in that he had failed to protect the defendant's interest resulting in the contra losses. If he had been misled by the alleged promise of the RM1 million, then he could bring an action against the defendant. As he acted as an agent of the plaintiff then his act in allowing over trading by the defendant was imputed to that of the plaintiff. If the defendant was unable to pay, then the T/P had to make good the loss to his principal, *ie*, the plaintiff.

[7] It was abundantly clear that without the T/P's indulgence, the defendant would not possibly have placed such big orders which the T/P had knowingly accepted as agent of the plaintiff. Thus, it was just and fair that the T/P should pay the amount in excess of the RM80,000.

[The defendant to pay RM80,000 and the T/P to pay sum of RM429,430.83 (ie, RM509,430.83 less RM80,000) to plaintiff; costs to plaintiff.]

Case(s) referred to:
Chai Then Song v. Malayan United Finance Bhd [1993] 1 AMR 22 ***(refd)***
OCBC Securities Pte Ltd v. Yeo Siew Huan [1998] 2 SLR 967 ***(refd)***
Ooi Yoke In & Anor v. Public Finance Bhd [1993] 2 CLJ 464 ***(refd)***
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 3 MLJ 633 ***(refd)***
The MV Hong Leong [1994] 3 MLJ 800 ***(refd)***
United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 2 MLJ 152 ***(refd)***
YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd [1997] 4 CLJ 300 ***(refd)***
Zalik Securities Sdn Bhd v. Tan Poon Ngee [1998] 1 AMR 478 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92

For the plaintiff - Yap Yau Sin; M/s Wan Junaidi & Co
For the defendant - Shankar Ram; M/s Shankar Ram & Co
For the 3rd party - Allan Lao (Sunny Sii with him); David Allan Sagah & Teng

Reported by Usha Thiagarajah

JUDGMENT

Muhammad Kamil Awang J:

The plaintiff claimed against the defendant for a sum of RM509,430.83 for contra losses incurred by the defendant with interest thereon at the rate of 13% p.a. from 23 August 1994 until full and final settlement. The defendant claimed an indemnity in the said sum against the third party, the plaintiff's agent.

In September 1993 the defendant approached the third party (T/P) who was then a trainee remisier with the plaintiff (the SSSB) with the intention of opening a trading account with the SSSB. On 26 April 1993 he submitted to the SSSB an application which was approved on 30 November 1993, the defendant was given a client's account no. ZBB 0859. The general practice is that a client will not deal with the internal officials of the SSSB but with a remisier who will deal with all transaction in his account. That is to say, he will buy and sell shares through his remisier (the T/P) only as agent of the SSSB. The T/P was then a trainee remisier or a dealer's agent (Code No. DJ5) and subsequently on 1 March 1994, he was promoted to be a full fledged licensed remisier, Code No. NFB.

The defendant filled up the particulars in the application form (exh. P1) and signed it, witnessed by the T/P. In the form it was stated that his annual salary was RM40,000, and based on this, he was given a trading limit of RM80,000 (*ie*, double the income). The trading limit was approved by SSSB, and this trading limit was known only to the SSSB including the T/P, but not the defendant.

The defendant and the T/P were former school mates while at SMK Green Road, although the T/P was slightly younger than the defendant in age and grade, they were buddies and played tennis together. However, the defendant reached the STPM level and left. He had no particular occupation; he worked for a while with DMT Futures in Singapore but could not continue working because he was not qualified. Later on he had assisted his brother (DW2), from time to time, as provision whole sales distributor. The T/P was more ambitious of the two, he went on for further studies in Australia, and graduated with a bachelor commerce degree from Murdoch University Australia. On his return, he joined the SSSB as a trainee remisier, on a fixed monthly salary of RM1,500. On 1 March 1994 he was promoted and became a licensed remisier, which means that he ceased to be a salaried agent of SSSB, but received a commission on every transaction that he made as a remisier. A remisier gets 0.004% as commission on any transacted amount. The larger the amount transacted, the bigger would be the commission that a remisier gets. This is

his livelihood; it is an incentive that spurs a remisier to do his best to get a large amount of trading by a client. Against this background, there developed a special relationship between the T/P and the defendant, which enabled the defendant to overtrade in his account to well over the permitted trading limit.

In June 1994 there was a heavy trading in the defendant's account which burst the defendant's limit of trading by more than six times. The T/P was in control of the defendant's trading and he had the power to stop the excessive trading in the defendant's account. It seemed that the T/P had allowed all the defendant's orders without any restriction. As a result the T/P was suspended on 21 June 1994 for 2 - 3 weeks. In an explanation that he gave to SSSB (the credit controller) for the over trading in June 1994 in the defendant's account was that the defendant had allegedly promised that a sum of RM1 million would be transferred from Singapore to the SSSB. It transpired that the sum of RM1 million was a mere fabrication; in the result the T/P made provision for the contra-losses in the remisier's account with the SSSB.

The Plaintiff's Case

The plaintiff's first witness, Noor Zakri bin Abdul Ghani, the credit control manager (PW1) at the material time, testified that the procedure for buying and selling shares was that instructions are made by the client to the remisier and following this, trading slips are issued by the remisier either to purchase or sell on behalf of the client. These trading slips are then passed to the central buyer and when orders are matched, the data would be keyed into the plaintiff's back room system. The back room office would then generate contract notes, which would be sent to the plaintiff's human resource department to be sent out.

PW1 testified that exhs. P2 and P3 were essentially computer generated documents detailing the transactions of share counters purchased by the defendant which resulted in contra losses, the subject matter of the plaintiff's claim. The accuracy of this system was without question as the data used to compile exhs. P2. P3 and P4 was based on matched data down loaded from the Kuala Lumpur Stock Exchange (KLSE) main frame. There are checks and balances to protect the integrity of the computer system.

The plaintiff had never received any complaints from the defendant regarding any irregularities in the share trading transactions record of the defendant. In fact, the defendant had confirmed in his testimony that he never made any complaints to the plaintiff or to the KLSE, securities commission or the police.

The plaintiff had received from the defendant a letter dated 14 July 1994 (exh. P5) which for ease of reference is reproduced below:

Andy Chan Chiaw Guan,
Lot 558 1st Floor
Jln Datuk Wee Kheng Chiang
93450 Kuching

The Credit Controller
Sarawak Securities Sdn Bhd
Kuching

14th July 1994

Dear Sir,

Re: Outstanding Contra Losses

With reference to your reminder dated 6th July, 1994 for A/C No. ZBB0859 on outstanding contra losses totalling RM$499,214.35 without considering interest charged, this serves to inform that I would not be able to settle the above amount within the time as specified in your reminder.

I am in the process of arranging for loans to settle this outstanding losses and it takes time to obtain approval for such substantial amount. I therefore would like to request for six months of grace period to arrange for this financing. During this period I would like to request for interest charged on this outstanding to be waived and the 1% charged on all transactions with effect from 6th June 1994 to be deducted from the contra losses.

Thank you for your kind consideration.

Your Faithfully.

...

Andy Chan Chiaw Guan

cc. Mr Fabian Ng

By this P5, the defendant was in effect admitting to the contra losses. Up to the date of the trial, the defendant had not retracted the letter and/or made a complaint to the plaintiff regarding the contents. It is noted that the defendant had engaged three legal firms from the commencement of this action including the present firm.

The second witness, Magdalene Ling Ming (PW2) the asst. manager of the management information system department, testified that the contract notes (exh. P7) being generated by the computer system. Exhibit P7 basically details the information of the orders made by the defendant keyed into the computer system during the day by the central buyer in respect of orders through the appointed remisier as reflected in the trading slip. Further P7 are generated

with the address of the defendant based on the address in exh. P1. After exh. P7 are generated it is passed to the human resource department (HRD) for posting. At the foot of P7 was printed a note: "All complaint of error must be made within 14 days". The defendant made no complaint within 14 days of the receipt of P7 or ever.

PW2 testified that whatever information keyed into the computer system was correctly reflected, she said (at p. 12 notes of proceedings):

> The data came from a common source – all information would tally

and data had not been lost. The plaintiff had a back-up system to prevent mishaps, and there had been no complaints against her department.

PW3 the administrative supervisor of the HRD, confirmed that exh. P7, P8 and P9 were duly posted out by the department. PW3's duties are subject to surprise checks by KLSE Auditor twice a year and the plaintiff's internal auditor once a month. There had been no complaint by the defendant, as a matter of fact exhs. P7 and P8 are found in the defendant's bundle of documents.

PW4, the assistant manager of accounts department testified as to the accuracy of exh. P8. He testified that at the closing balance for contra losses due by the defendant to the plaintiff as at 30 June 1994 was RM500,435.01 (pp. 70 and 132 of the plaintiff's and defendant's bundle of documents respectively). There had been no complaint against this statement. This was confirmed by the defendant (at p. 41 of notes of proceedings):

> Pages 124 - 133 Defendants Bundle of Documents same as P8. Monthly statements from Sarawak Securities – for June 1994. I did not make or attempt to complain to Sarawak Securities.

The Defendant's Case

The defendant testified that when he filled up the application form (exh. P1) he left the 'annual income' blank. Someone filled up the figure 'RM40,000'. The T/P had informed him that his application to open an account had been approved on 30 November 1993 but he was not informed of the trading limit RM80,000 at the time.

The plaintiff's claim against the defendant is in respect of contra loses in the month of June 1994, for the period of 6 June 1994 until 20 June 1994 as in exhs. P3, P4 and P8.

In the T/P's statement of claim dated 1 March 1996 the defendant pleaded that he authorised the T/P to purchase and sell specific counters recommended by the T/P up to his trading limit of RM80,000.

In March 1994 he instructed the T/P to stop trading in his account. As such he made no trading since March 1994. He admitted that he had received the contract notes for the month of June 1994 (exh. P7), the monthly statement (exh. P8) and the statement on the contra losses (exh. P9) and yet he did not make any complaint or representation to the SSSB or the security commission or the KLSE. He admitted that he had accepted the statement on contra losses exh. P9 and he did complain to the T/P about it but he took no further action.

He did not make any complaint to the SSSB or the security commission or the KLSE because he did not know about it. In fact he did not lodge a police report.

The defendant did not produce any evidence to show that he had instructed T/P to stop trading in his account. He merely stated that in March 1994 he had instructed the T/P not to trade in his account. He did not give any reason why he wanted to stop trading in March 1994. It is not clear how the instruction was conveyed to T/P and when he first made complaint against trading in his account. This instruction to stop trading was not written, and the circumstances did not support this allegation. There was no trading in his account between March 1994 to June 1994. On 6 June 1994 he had paid a sum of RM9,000 against contra losses, and he was allowed to re-trade. The defendant refuted that the contra losses of RM509,430.83 were not incurred by him without any evidence in support, documentary or otherwise.

The defendant in his defence denied that he had traded excessively and thus incurred big losses in his trading account in June 1994. In fact, he had stopped the T/P from trading in his account in March 1994 and he alleged that a remisier Code DG2 (Desmond Kua) appeared to have used his account without his consent or knowledge. It was a general allegation which did not condescend to particulars. Exhibit P5 was allegedly prepared by the T/P who brought it to him which he signed. There was no evidence that it was done by the T/P. Subsequently, in the end of July or early August 1994, the T/P sent him through an assistant, a draft letter (ID4), backdated it to 25 June 1994 in support of exh. P5. However, the defendant had refused to sign the letter, kept a photocopy thereof and returned the letter to the T/P. The ID4 was copied to four persons who were unknown to him, including a copy to Benny Ng, the chief executive officer of the SSSB who, according to a report in the local papers had been involved in shares scam with the SSSB, and had been charged in the sessions court. ID4 could not be admitted in evidence as there is no positive identification of the writer thereof.

The defendant had signed exh. P1 and he was bound by it. When a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation, the party signing it is bound and it is wholly immaterial whether he had read the document or not or whether he knows no English and the contents were not explained to him. See *Ooi Yoke In & Anor v. Public Finance Bhd* [1993] 2 CLJ 464.

In *Chai Then Song v. Malayan United Finance Bhd* [1993] 1 AMR 22, the court held that:

> The plea of *non es factum* does not assist a person who signs a document negligently .... A person who is careless and who does not find out the contents of the document he is executing or who relies completely upon others to complete the said document is responsible for his own actions. Such a person cannot later allege that the contents of the document do not bind him or that there was no *consensus ad idem*.

See also *OCBC Securities Pte Ltd v. Yeo Siew Huan* [1998] 2 SLR 967.

In my view, exh. P1 is a valid and binding document, whose terms and conditions are binding on the defendant In fact, in the statement of defence, para. 2, the defendant had admitted it.

Basically parties are bound by the terms and conditions of the contract entered into under a trading account for the purchase and sale of shares. The authority on this point is *Zalik Securities Sdn Bhd v. Tan Poon Ngee* [1998] 1 AMR 478. See also ss. 91 and 92 of the Evidence Act 1950.

In the instant case the intention of the parties is clear, for cl. 6 provides:

> SSSB shall accept no responsibility for the decision of the applicant to issue any instructions to SSSB to purchase or sell securities. All instructions from the applicant are accepted by SSSB on the basis they constitute the applicant's own judgment arrived at independently.

Based on these authorities the plaintiff is not in a position of a fiduciary relationship with the defendant, the relationship between them is purely contractual.

There is an attempt by the defendant to raise conspiracy, where at p. 40 of the notes of proceedings:

> ID4. Do you know Benny Ng was involved in your case?
>
> I had an unsigned letter (copy with me – I wondered why the letter c.c. to these people because I do not know them. In late 1999 I read in the Borneo Post that Benny Ng, CEO SSSB was charged in the Sessions Court Kuching - *ie*, misuse of customer's account. He could be involved in my trading account.

In *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997] 4 CLJ 300 at p. 337 it was held that:

> Furthermore, any allegation of conspiracy must be specially pleaded and full particulars given before any evidence can be led on it. There was no such plea here, and the learned trial Judge quite correctly brushed these allegations aside.

This piece of evidence of the alleged conspiracy was not specifically pleaded, and ID4 was not admitted in evidence (see above) thus the evidence is disregarded.

In the cross-examination of the T/P by the defence counsel, it was alleged for the first time that there were other remisiers trading on the defendant's account as shown in exhs. D6, D7, D8 and D9. These documents are inadmissible for non-discovery, which took the plaintiff and T/P by surprise. lt is trite law that where there is an order for discovery, a party is obliged to make discovery of all documents relevant to the matters in his action. In *"The MV Hong Leong"* [1994] 3 MLJ 800, the court held:

> ... that those exhibits are not admissible as they were not disclosed by the second defendant in the list of documents and as such the second defendant has run foul of the rules as to discovery. As such I would reject the exhibits. (see *Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shah (T/a JB International)* [1990] 2 MLJ 282).

Moreover, this allegation that other remisers were involved in trading on the defendant's account was not pleaded by the defendant in either the T/P's statement of claim or in his statement of defence. In *Yew Wan Leong v. Lai Kok Chye* [1990] 2 MLJ 152 (SC), the Supreme Court held that:

> (1) As the trial court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal must be allowed and the order of the learned judge in dismissing the plaintiff's claim be set aside.
>
> In p. 155, Gun Chit Tuan SCJ said:
>
> We would point out that this court had recently once again stressed the importance of pleadings in *Muniandy & Anor v. Muhammad Abdul Kader & Ors* in which Mohamed Azmi SCJ stated at p 418 that:
>
> > Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1982] 1 AC 191 at p 233:
> >
> > Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse

> to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...
>
> As the High Court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal in this case must be allowed ...

See *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151 (FC) *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 3 MLJ 633.

On the evidence as a whole, it is clear that the defendant had incurred the contra losses in his account. The plaintiff had proved to the satisfaction of the court its claim against the defendant

The Third Party's Case

T/P testified that it was his duty to protect the interest of his client (the defendant). In answer to a question put by the defendants counsel (p. 26 notes of proceedings) T/P said:

> I will protect my client, not SSSB.
>
> It is my duty to keep all records of transaction
>
> – includes compliance with restrictions on client's trading account

In other words his duty to protect the interest of the defendant means that he must see that the defendant would not overstep the trading limit allowed to him. This is well illustrated by the fact that the T/P had stopped the defendant from trading in March 1994, and when the defendant paid RM9,000 on 6 June 1994 against contra-losses in his account, he was allowed to re-trade in his account (see para. 43 below). It is abundantly clear that the T/P had absolute control over the defendant's trading account.

There are three ways of placing an order, by placing the order personally, or by phone or by computer. The defendant made his orders by phone to the T/P. The T/P testified at p. 19 notes of proceedings that:

> Andy makes orders through telephone to me at the office and I filled up the Trading slip (top part).
>
> Then I pass it to the central buyer – matched – to phone and confirm it to buyer.
>
> All these Trading sits are Andy's order.
>
> I made the orders for him

When an order is received, the T/P will prepare the trading slip in triplicate, two of which are fed into the computer system, the central buyer which is a broker with KLSE. and he keeps a copy for his own record. The score machine, a willing seller and a willing buyer, will find a match. The back room office will generate contract notes. The management information system will

issue the contract notes, and a copy thereof is sent to the client by the HRD. PW1, the credit control manager, oversees the control system in the SSSB.

The T/P knew that the trading limit for the defendant was RM80,000 which was fixed by the SSSB on the basis of the defendant's annual income of RM40,000 as stated in exh. P1. The defendant had denied that he filled in the figure 'RM40,000' in P1. Who wrote the RM40,000 is irrelevant to the issue under consideration as the SSSB has the discretionary power in putting a ceiling to a trading account The defendant had to place his orders to the T/P who had accepted them and it was within the knowledge of the T/P of his client's account. Bearing in mind that his income was dependent solely on commissions paid to him based on the amount transacted, he had taken a calculated risk. At p. 20 notes of proceedings, the T/P testified that:

> I tried to control the defendant from purchasing more shares. Sometimes he was convincing on the technical analysis. Prior to June incident. I went to his office. The defendant was risky trying to beat the market within a day. Defendant practice what he preached and the market beat him.

It is clear that the T/P had tacitly allowed or condoned the act of the defendant by placing large orders beyond his trading limit. The T/P did not attempt to stop the defendant's trading when the limit of RM80,000 was reached. The reason for his action was based on an alleged promise of RM1 million by the defendant. There is no evidence that the defendant had made such a promise. There is no evidence that the defendant had RM1 million in cash or other assets. The background of the defendant was well known to the T/P as they were buddies since school. Assuming that the income of RM40,000 per year was correct there was no evidence to show that he had assets worth RM1 million.

The T/P testified that prior to 20 June the defendant had made a profit of over RM100,000. He was expecting a large sum of money from Singapore, and a sum of RM1 million would be remitted to SSSB from Singapore. In the examination in chief (at p. 21 notes of proceedings), the T/P said:

> Prior to June 20, Andy Chan had made a profit of over RM100,000. He was expecting a large sum of money from Singapore. From his chart reading it was a good day. The sum RM1 million would be remitted from Singapore to SSSB.
>
> He started giving orders and I keyed in his orders.
>
> On June 21, I was suspended because the RM1 million did not come in.

The T/P knew or ought to have known that the defendant had no distinct occupation and had no RM1 million from Singapore. The T/P's statement about the RM1 million was merely hearsay. It is a figment of his imagination. In

his enthusiasm to reap a fat commission, the T/P seemed to have erred in his judgment to be able to discern what was the correct thing to do. Nonetheless, he had acted carelessly. He accepted the orders from the defendant way beyond the limit allowed. The T/P had a duty to do, and he had failed in discharging his duty faithfully. By this he had tacitly encouraged the defendant to place excessive orders and together they ventured into the unknown.

The defendant started to give large orders and the T/P keyed in the orders. By 20 June, it was discovered that the defendant had over-traded by more than six times, in excess of the limit allowed to him. As a result the T/P was suspended on 21 June 1994 for 2 - 3 weeks. *He deposited into the remisier's account a provision for the contra losses incurred in the defendant's account. In other words, the T/P as agent of the plaintiff had accepted the responsibility by making good the losses with a provision in the remisier's account.*

The T/P then approached the defendant at the latter's office on 14 July 1994 and in his presence the defendant signed a letter, exh. P5 and handed it to him. However he had no knowledge of the existence of ID4 (inadmissible, see above) and denied that he had ever sent it through an assistant to the defendant for the latter's signature.

The Trading Limit Of RM80,000

The trading limit of RM80,000 was approved by the SSSB for the defendants accounts. This was evidenced by PW1, PW2 and PW4's testimonies in court. This limit must have been communicated to the defendant through the T/P. The defendant testified that he was never informed about it. This cannot be true because the SSSB, like any other trading houses, will not grant a trading account without a limit, *ad infinitum*. By imposing a trading limit on a client's account the SSSB will be able to effectively control the account. From common sense view point, a person who plays shares must surely know his trading limit unless there is evidence to show that he has been given a free account without limit.

PW1 testified (at p. 4 notes of proceedings):

> P1 – for internal purpose we assigned to the particular client – not informed until the monthly statement issued ... At the material time remisier had not breached his trading limit. We advised him of his risk. No deposit made nor payment.

At p. 6:

> I know the duty of the remisier. Not necessary he follows the client's trading limit. I stopped if remisier overstep his trading limit. Remisier has an available trading limit - flexible.

It is clear from the evidence of PW1 that what is important is the trading limit of the remisier with the SSSB and not the trading limit of the client. This piece of evidence stands unchallenged.

There is no duty owed by the plaintiff to ensure that the defendant traded within a trading limit of RM80,000 as the trading limit stated in exh. P1 is an internal matter for internal credit control of the plaintiff. In *OCBS Securities Pte Ltd v. Yeo Siew Huan* [1998] 2 SLR 106 the court held that:

> 23. Mr. Yap contended that there was a general duty to ensure that the client did not over extend herself. With respect, I cannot see how the bye-laws could established such a duty on the part of the plaintiff to a person of full age and sound mind as the defendant. A in dealing with B in a commercial situation may extend credit to B if he considers that B is good for a certain sum. But having extended it, if A finds that B is unable to repay A has to face the consequences of his mistake. If A considers litigation worthwhile he proceed with a suit to recover the sum owed and obtains and enforces judgment against B. If B does not have the assets to satisfy the judgment then A will have to write off the shortfall. A cannot be precluded from suing B for the debt because he had misjudged the credit-worthiness of B.

In the instant case, the T/P submitted that on 6 June 1994 the defendant's payment of RM9,000 in settlement of contra-losses of RM834.49 was to enable the defendant to start trading again. This was because the T/P (PW5) had stopped the defendant (DW1) from trading in his account in March 1994 due to unpaid contra-losses. On the same token, why didn't the T/P stop the defendant from trading as soon as the RM80,000 was reached? It seems clear that the T/P could have stopped the defendant from trading when his trading limit had been reached but he did not. There is no evidence that the T/P did or attempted to stop the defendant from trading when the trading limit of RM80,000 was breached. The T/P had not offered any explanation or reason for his non-action other than the alleged RM1 million promise. In fact, in allowing the defendant to overstep his trading limit, the T/P had committed a breach of duty in that he had failed to protect the defendant's interest resulting in the contra-losses. If he had been misled by the alleged promise of the RM1 million, then he could bring an action against the defendant. As he acted as an agent of the plaintiff then his act in allowing over trading by the defendant was imputed to that of the plaintiff. If the defendant was unable to pay, then the T/P had to make good the loss to his principal, the SSSB.

As an academically qualified person with some experience the T/P had unwittingly let himself into a situation that misled his principal. He had acted unreasonably. Therefore he was responsible for the contra losses in the defendant's account beyond the trading limit of RM80,000.

The T/P did not exhibit as a person of strong character with firm conviction. He takes things for granted, on its face value, e.g. he did not verify the particulars in exh. P1 before accepting it. During the trial while giving evidence in chief, the T/P displayed so much of emotion that he was in tears while ranting that the good intention he had in helping a friend (*ie*, the defendant) this was what he received in return. Needless to say, this demonstrated that the T/P was not at all innocent. It is abundantly clear that without the T/P's indulgence, the defendant would not possibly had placed such big orders in 6 to 20 June 1994, which the T/P had knowingly accepted as agent of the plaintiff. **In view of the above, it is just and fair that the T/P should pay the amount in excess of the RM80,000**.

In my judgment the plaintiff had, on the balance of probabilities, proved its claim against the defendant in the sum of RM509,430.83 at 13% interest as prayed, *of which sum the defendant to pay RM80,000 to the plaintiff and the T/P was liable to pay the plaintiff in the sum of RM429,430.83 (that is RM509,430.83 less the RM80,000) and costs to the plaintiff to be paid by the defendant (1/6) and the T/P (5/6) to be taxed unless agreed*.